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May 14, 2014

Gregg McLean Adam
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Alex Gurza
Deputy City Manager
Office of the City Manager
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113

Re: Proposed Retirement Board Governance Changes
File No.: 040507

Dear Alex:

Thank you for your letter of May 8, 2014. We appreciate your clarification that you do not consider the May 21, 2014 to be a meet and confer. This information has been helpful to our client, the San Jose Police Officers' Association (the "POA"), in our understanding of how the City plans to address proposed changes to the Police and Fire Retirement Plan Board of Administration and the Federated City Employees' Retirement Plan Board of Administration ("Retirement Boards").

What remains unclear to us is any indication that the City intends to reach out to the POA to meet and confer regarding these proposed changes. In your May 8, 2014 letter, you note the City's proposed changes to the retirement board "may be" subject to meet and confer. The POA's response is that there are, in fact, items subject to meet and confer.

In your Memorandum of February 21, 2014, you set forth Cortex's recommendations that the City seeks to implement. The intent of this letter is to discuss the matters we think implicate the meet and confer requirements of Section 1111 of the City Charter. Thus, we believe that the proposed changes we discuss below are, in accordance with established labor law principles, subject to good faith negotiations with the POA **before the City moves forward** with such changes.

Changes to the composition of a retirement board are a mandatory subject of bargaining. This is not open to dispute. In 1999, a tripartite agreement was negotiated by the City, IAFF, Local 230, and the POA regarding the addition of two

seats to the Police and Fire Retirement Plan Board: a retired police officer/fire fighter; and a member of the City's administration with, as the City phrased it, "some fiscal background." Indeed, those negotiations culminated in a written agreement entitled "Agreement—Negotiations Regarding Composition of Police and Fire Retirement Board." This "Agreement" increased the Board from five to seven members by adding the aforementioned police/fire fighter retiree and representative from the City Administration, specified the terms of the new members and their respective qualifications, along with the procedures by which any vacancy in their positions would be filled, and set forth a detailed process for selection of the police/fire retiree Board member. On the City's side, you were a signatory to that Agreement, which is attached hereto for reference.

Our April 7, 2014 letter, also attached, sets forth established labor law principles that apply to the proposed retirement board changes. Because we received no substantive response to that letter, we reiterate some of the case law set forth in that letter. The law is unequivocal: (1) any change that impacts board composition, selection, or independence is subject to meet and confer; (2) any change that impacts or constricts the Board's independent decisions which, in turn, may impact investments is subject to meet and confer; (3) any change to any employees' status that potentially impacts POA members' employment and working conditions is subject to meet and confer.

(1) Retirement Board Composition

A public sector retirement board's composition falls within the ambit of collective bargaining obligations. In a Court of Appeals decision from the State of Michigan, it was held that the composition of a retirement board is a "mandatory subject of bargaining" because composition impacts the board's decisions regarding benefits, such as entitlement to a disability pension, for example. (*City of Detroit v. Michigan Council 25 American Federation of State, County and Municipal Employees* (1982) 118 Mich.App. 211, 218.) In addition, composition impacts *how* funds are invested which, in turn, determines the amount of benefits employees receive. (*Id.* at 218-19.)

In your February 21, 2014 Memorandum to Ed Shikada, you stated the City is looking to collapse the Retirement Boards into just one board. You also noted the City is considering reducing the number of plan member representatives seated on each board from 50% to 25%. The seats, you stated, would be replaced with independent individuals (non-representatives). Not included in the Memorandum is the fact that, under the Cortex recommended plan, 25% of independent board members would be **selected by plan members**. Each of these items is subject to meet and confer.

(a) Collapsing Boards Into One Board and/or Reducing Number of Active or Retired Plan Members Sitting on Board(s)

The Cortex recommendation to collapse the two boards into one was intended to take advantage of better efficiencies and economies of scale. While laudable, this does not eliminate the fact that member representation would be reduced—so that only “token” representative members of the Police and Fire Plan and from the Federated City Employees’ Plan would sit on a “combined” retirement board. Lacking a critical mass, there would be no sub-group of members effectively attending to the respective needs of each distinct retirement plan. Collapsing two boards into one as well as reducing plan member representation are matters subject to meet and confer prior to implementation of these changes. (See *City of Detroit*, 118 Mich.App. at 219; see also *Detroit Police Officers Assoc. v. City of Detroit* (1974) 391 Mich. 44, 63; see, e.g., *City of San Jose v. International Assoc. of Firefighters Local 230* (“Local 230”), No. H037197, 2013 WL 978897, at *8 (Cal.App. 6 Dist. March 13, 2013) [“To the extent the proposal asks that data be tracked separately for police and fire department participants to create, in effect, a separate plan within a plan for the members of Local 230, the proposal could affect retirement benefits and is, therefore, arbitrable.”].)

(b) Adding Power to City to Remove Board Members For Cause

Your proposals set forth in the February 21, 2014 Memorandum would give the City the power to remove any board member based on “*performance or conduct*.” This broad mandate gives authority to the City to change the composition of the boards and may all but eliminate the independence of board members. It would give the City carte blanche to change the makeup of the board by replacing board members undesirable to the City. Like any change having an impact on the makeup of a retirement board, this change is subject to meet and confer requirements. (See *City of Detroit*, 118 Mich.App. at 219.)

(c) Qualifications of independent Board Members

In addition, the City’s proposal would change the criteria by which it adds certain board members, by setting qualifications for appointment as independent board members. That criteria is subject to meet and confer. Just like the City’s plan to cut member representation itself, the criteria for the independent members who would replace them would narrow the pool of those qualified to sit on the board, thereby impacting composition of the board. (See, e.g., *Detroit Police Officers Assoc.*, 391 Mich. at 51 [duty to bargain exists as to impacts to retirement plan and is paramount among City Charter requirements for making changes to plan].)

(2) Retirement Board Investment Requirements

A change to the investment requirements limiting the Retirement Boards' decisions as to "economically targeted investing" *may* be subject to meet and confer. (See, e.g., *Local 230*, at *3 ["Other [employer] decisions are not primarily about an aspect of the employment relationship but may have impacts that must be negotiated depending upon the facts."].)

The details regarding changes to the parameters for investing are unclear. It appears such changes could potentially impact returns on investments, and if that is even potentially the case, the changes are subject to bargaining. (See *City of Detroit*, 118 Mich.App. at 218.) The POA does not have any factual details that would assure us that proposed investment parameters solely would address conflict of interest concerns and not limit the discretion *properly* accorded to the Retirement Boards. Thus, we conclude this proposal is subject to meet and confer as well. (See *id.*; see also *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 676-677.)

(3) Changes in Employment Status for Board Staff

Bumping rights and other employee rights of POA members may be impacted by the City's proposal to make changes to the status of all staff working for the Retirement Boards. Changes to the status of other employees that effect employment rights and conditions are subject to bargaining in good faith. (See *Alameda County Mgmt. Empl. Assoc. v. Superior Court* (2011) 195 Cal.App.4th 325, 352.) This potential effect brings contemplated changes to the employment status of the boards' staff members into the realm of mandatory bargaining. (See *id.* at 344.)

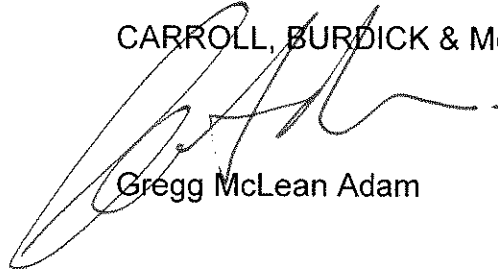
In conclusion, we believe that these changes would impact board composition and board staff employment status. They are unequivocally subject to meet and confer. Similarly, empowering the City with the ability to remove board members based on conduct or performance and changing the qualifications of board members are subject to meet and confer. All of these proposed changes would impact POA members' benefits and working conditions. We believe that more information is required as to other proposals, including those contained in your February 21, 2014 Memorandum that are not discussed here, as well as the parameters the City proposes as to investments. It is well established that changes to investment policies that may impact how the funds perform are subject to meet and confer.

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We look forward to hearing from you further with respect to the changes to the Retirement Boards currently under consideration. We ask that the City provide dates to begin the meet and confer process sometime after the meeting on May 21, 2014.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP

A handwritten signature in black ink, appearing to read "Gregg McLean Adam", is written over the printed name.

Gregg McLean Adam

GMA:jag
Enclosures

cc: Jim Unland, President, SJPOA
John Robb, Vice President, SJPOA
Franco Valdo, Chief Financial Officer, SJPOA
Ed Shikada, City Manager
Jennifer Schembri, Deputy Director Employee Relations



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April 7, 2014

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VIA E-MAIL AND U.S. MAIL

Ed Shikada
City Manager
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San José, CA 95113
E-Mail: ed.shikada@sanjoseca.gov

Re: City's Obligation to Bargain Over Proposed Changes to Retirement Board

Dear Mr. Shikada:

It has come to the attention of our client, the San Jose Police Officers' Association (the "POA"), that the City plans to move forward with the Retirement Board governance changes recommended by Cortex Applied Research as outlined in the February 21, 2014 Memorandum from Alex Gurza to the Mayor and City Council. We write to remind the City that many of the proposed changes are within the scope of bargaining and the City would normally have an obligation to negotiate in good faith with the SJPOA **before** moving forward with these proposed changes.

City Charter Section 1111 requires the City to "negotiate in good faith with the recognized fire and police department employee organizations on all matters relating to the wages, hours, and other terms and conditions of City employment" The City Charter mirrors California's Meyers-Milias-Brown Act in this respect, which requires that public employers "meet-and-confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of ... recognized employee organizations ... prior to arriving at a determination of policy or course of action." (Cal. Govt. Code §3505.) Unlike the MMBA, however, Section 1111 goes further and provides that any impasse in negotiations between the City and its police and fire unions must be resolved through a binding arbitration process.

As evidenced by the history of bargaining over the makeup of the Retirement Board, the structure and composition of the Retirement Board as a mandatory subject of bargaining should be undisputed. In 1999, for instance, the City, IAFF, Local 230,

Ed Shikada

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and the POA negotiated over the addition to the Retirement Board of both a retired police officer/fire fighter and a member of the City Administration with, as the City phrased it, "some fiscal background." Indeed, those negotiations culminated in a written agreement entitled "Agreement—Negotiations Regarding Composition of Police and Fire Retirement Board." This "Agreement" increased the Board from five to seven members by adding the aforementioned police/fire fighter retiree and representative from the City Administration, specified the terms of the new members and their respective qualifications, along with the procedures by which any vacancy in their positions would be filled, and set forth a detailed process for selection of the police/fire retiree Board member. On the City's side, that Agreement was signed by then-Acting Employee Relations Manager Alex Gurza. A copy of the Agreement is enclosed for your review.

The City's past recognition of the changes made to the Retirement Board as within the scope of bargaining are entirely in accord with established labor law principles on this subject. Here, a good explanation of why the composition of a public sector retirement board falls within the ambit of collective bargaining obligations can be found in a Court of Appeals decision from the State of Michigan, which held unequivocally that the composition of such retirement boards is a "mandatory subject of bargaining" that cannot be changed absent negotiations with the affected labor organizations. As the Appellate Court explained:

The powers of the Boards of Trustees are substantial and have a significant effect upon the conditions of employment. They include the power to determine whether employees are totally disabled as a result of their performance at city work so as to entitle them to the increased benefits provided under duty disability pensions. Similarly, the Boards of Trustees determine whether employees are totally disabled due to non-duty disability, entitling them to early and substantial pension benefits. ... [T]he Boards of Trustees also compute the City's contribution liability to the fund, for which the Mayor and Council must appropriate sufficient funds. Finally, the Boards of Trustees determine the investment of funds which in the long run determines the amount of benefits, amount of City contributions and amount of employee contributions.

(City of Detroit v. Michigan Council 25 American Federation of State, County and Municipal Employees (1982) 118 Mich.App. 211, 218-19.)

Having outlined the City's legal obligation to bargain over changes to the Retirement Board composition and the parties' past history of bargaining consistent with that legal obligation, we would be remiss if we did not raise the zipper clause in Article 19 of the parties' MOA, which prevents changes within matters in the scope of bargaining during the lifetime of the contract. Notwithstanding the zipper clause,

Ed Shikada

Re: City's Obligation to Bargain Over Proposed Changes to Retirement Board

April 3, 2014

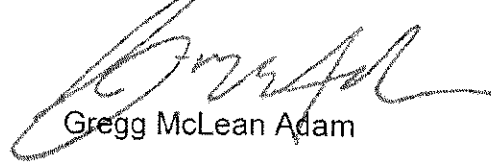
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however, the POA is open to discussing these proposed changes with appropriate representatives of the City.

If the City wishes to discuss these changes, please advise Jim Unland or the undersigned at your earliest opportunity.

Very truly yours,

CARROLL BURDICK & McDONOUGH LLP

A handwritten signature in dark ink, appearing to read "Gregg McLean Adam", is written over the typed name.

Gregg McLean Adam

GMA:jo

Enclosure

cc: Jim Unland, President, San Jose POA
John Robb, Vice President, San Jose POA
Franco Vado, Chief Financial Officer, San Jose POA
Alex Gurza, Deputy City Manager
Jennifer Schembri, Deputy Director Employee Relations

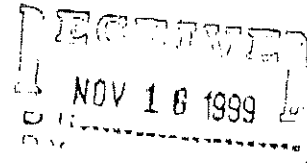
PROTENTATIVE AGREEMENT
NEGOTIATIONS REGARDING COMPOSITION
OF POLICE AND FIRE RETIREMENT BOARD

ORIGINAL

1. COMPOSITION

Increase Board from 5 to 7 members by adding:

- A retiree; and
- Member of the Administration (with some fiscal background) in a position of Deputy Department Head or higher



2. TERM OF OFFICE

Retiree Representative

- Four-year term
- Person may be appointed for second term
- If the Retiree Representative position has been held by retired members of the Fire Department for any consecutive eight-year period, the next appointment shall be a retired member of the Police Department, unless no retired member of the Police Department submits a nomination petition
- If the Retiree Representative position has been held by retired members of the Police Department for any consecutive eight-year period, the next appointment shall be a retired member of the Fire Department, unless no retired member of the Fire Department submits a nomination petition

Administration Representative

- Four-year term
- Person may be reappointed for subsequent terms

3. APPOINTMENT PROCESS

Process for selection of Retiree Representative includes the following:

- Eligibility limited to retirees only (not spouses, survivors or deferred vested)
- Nomination petition signed by 10 Police & Fire retirees (Process will be similar to the process for the employee representatives.)
- Election among retirees, conducted by City Clerk's Office, to determine a retiree to be recommended for appointment in the same manner as employee members are selected.
- A panel consisting of one representative each from the POA, Local 230, and the City Manager's Office would interview the three people with the highest number of votes. The purpose of the panel is to ensure that the candidates are viable, i.e., are able to attend meetings and fulfill the time commitment required of Board members.
- Panel makes recommendation(s) to City Council. If the panel unanimously agrees on a candidate, that candidate will be the panel's recommendation. If the panel recommends a candidate by a 2-1 vote, the candidate receiving two votes will be the panel's recommendation, and the dissenting member of the panel may submit a dissenting report. If there is no agreement on a candidate to recommend to Council, each panel member may submit its written recommendation to Council.
- The results of the recommendation of the voting retirees and the panel's recommendation will be reported to the City Council.
- City Council appoints a retiree to the Board
- In response to a request from the POA and Local 230, the Council should appoint a retired member of the Fire Department as the first retiree representative

Process for Administration member:

- City Manager makes recommendation to City Council
- City Council appoints Administration member to the Board

4. MID-TERM VACANCY

Retiree Representative

- Retiree Association recommends up to three candidates to the Board
- Board interviews candidates and makes recommendation to Council
- Council appoints a retiree to the Board to complete the remainder of the term

Administration Representative

- City Manager makes recommendation to City Council
- City Council appoints an Administration member to the Board to complete the remainder of the term

5. REMOVAL PROCESS

Current Municipal Code Sections:

- 2.08.050 Board or Commission seat vacancies
- 2.08.060 Absence from meetings
- 2.08.130 Removal from office
- 2.08.140 Temporary vacancies

Amend Section 2.08.130 so that the section does not apply to members of the Board. Amend the provisions relating to the membership of the Board so that any Board member could be removed for cause.

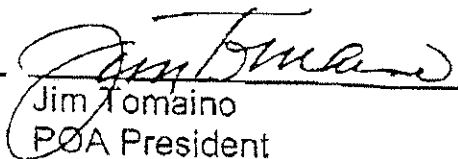
The POA, Firefighters Union or City Manager may submit a request for removal to the City Council. The request must state the grounds. The City Council would hold a hearing and if it concluded that cause for removal had been demonstrated by substantial evidence, it could remove the member.

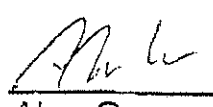
This tentative agreement is subject to ratification of each union and approval by the City Council.

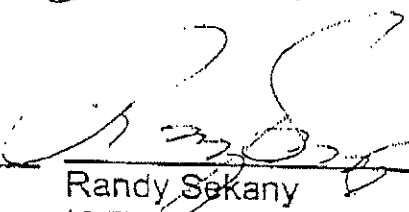
For the City:

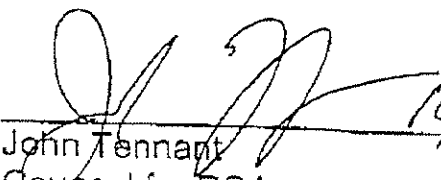
For the Unions:

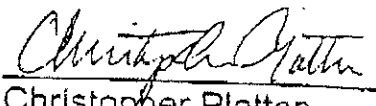

Debra J. Rigone
Assistant City Manager


Jim Tomaino
POA President

 10/6/99
Alex Gurza
Acting Employee Relations
Manager

 10/6/99
Randy Sekany
IAFF President, Local 230

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John Tennant
Counsel for POA

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Christopher Platten
Counsel for IAFF, Local 230